FEDERAL MARITIME COMMISSION

DOCKET NO. 87-22

UNITED STATES LINES (S.A.) INC. - PETITION FOR DECLARATORY ORDER RE: THE BRAZIL AGREEMENTS

ORDER ENTERTAINING PETITION AND REFERRING MATTER TO ADMINISTRATIVE LAW JUDGE

United States Lines (S.A.) Inc. ("USL/SA") has filed a Petition for Declaratory Order ("Petition"), pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, to remove uncertainty between USL/SA and A/S Ivarans Rederi ("Ivaran") as to the correct legal interpretation of certain provisions of two northbound Brazil/United States cargo revenue pooling agreements ("Agreements") - the Brazil/U.S. Gulf Ports Agreement, FMC Agreement No. 212-010320 ("Gulf Agreement"), and the Brazil/U.S. Atlantic Coast Agreement, FMC Agreement No. 212-010027 ("Atlantic Agreement"). Specifically, USL/SA asks that the Commission find that: (1) cargo moving by water from Brazil, discharged from the vessel at an Atlantic Coast port and then transported by overland transportation to a Gulf port, moving under a bill of lading showing a Gulf port as the destination port, should be accounted for in only the Gulf Pool; and (2) the Agreements permit a reconciliation and payment on less than a full calendar year basis when a national-flag carrier terminated its services in the trade

as a result of bankruptcy, and has been or will be replaced by a new national-flag carrier in the trades and Agreements.

The Petition involves resolution of the proper interpretation of the two pooling agreements in the northbound Brazil/United States trades during the period January 1, 1985 through March 31, 1987, when USL/SA and Ivaran were active carriers in United States commerce. Under Ivaran's interpretation of the Atlantic Agreement, USL/SA would be eligible to receive approximately $450,000 less than if the Agreements are interpreted as USL/SA desires.

USL/SA has since November 24, 1986 been the Debtor-in-Possession in a Voluntary Petition of Bankruptcy filed pursuant to Chapter 11 of the United States Bankruptcy Code, Docket Number 86B-12241, with the United States Bankruptcy Court for the Southern District of New York. Pursuant to provisions of the Bankruptcy Code set forth at 11 U.S.C. § 365, and as implemented by orders of the Bankruptcy Court, USL/SA is authorized to affirm or reject certain contractual arrangements and agreements and to take such other actions in furtherance thereof not inconsistent with the Bankruptcy Code and the Order of the Bankruptcy Court, as USL/SA, in the exercise of its judgment, deems necessary and appropriate. In order to act without peril on its own view as to ratifying or rejecting the Agreements in light of the potential financial impact on the estate of USL/SA and in order to remove uncertainty as to the correct apportionment

of revenues among the parties to the Agreements, USL/SA seeks a declaratory order here as to the correct interpretation of those Agreements.

The Commission published the Petition in the Federal Register (52 Fed. Reg. 43798-99) and provided for a reply by Ivaran and intervention and replies by other interested persons. A petition for intervention and reply in support of USL/SA's Petition was filed by American Transport Lines, Inc. ("Am Trans"). Ivaran filed a reply in opposition to USL/SA's Petition and also opposes Am Trans' intervention. Subsequently, USL/SA submitted a letter which, inter alia, forwarded minutes of pool meetings which it contends had just become available. Ivaran responded to USL/SA's letter.

BACKGROUND

There are four pooling agreements on file with the Commission and in effect between the Atlantic and Gulf Coasts of the United States and Brazil. These agreements cover: (1) southbound U.S. Gulf/Brazil; (2) southbound U.S. Atlantic/Brazil; (3) northbound Brazil/U.S. Gulf; and (4) northbound Brazil/U.S. Atlantic movements. There are four similar agreements on file and in effect in the trades involving the United States and Argentina.

The northbound Brazil/U.S. Atlantic Coast Agreement, No. 212-010027, during the period January 1, 1985 through March 31, 1987, provided and at present provides in relevant part:

Article 2 - The parties desire to promote more efficient service for shippers and consignees, and to provide beneficial and fair cooperation in the northbound movement of cargoes between the ports or points of Brazil and the U.S. Atlantic ports.

Article 4(a) - This Agreement covers the apportioning of freight revenue among the parties resulting from the freighting operations on all cargo that they carry as hereinafter described, transported by the parties northbound, on owned and/or operated vessels, from the ports of Brazil, within the Porto Alegre/Rio Grande-Recife range, both inclusive, to any port on the Atlantic Coast of the United States.

Article 11(a) - It is agreed that all cargo, shipped from ports of the Coast of Brazil and destined to Atlantic ports of the United States of America, as established in Article 4, shall be subject to this pool, including transshipment cargo to U.S. ports and other than U.S.A. destinations and discharged at U.S. Atlantic ports, such cargo hereinafter being referred to as pooled cargo . . . .

The northbound Brazil/U.S. Gulf Ports Agreement, No. 212-010320, had, as of January 1, 1985, contained virtually identical language but, effective April 17, 1986, was modified to read as follows:

Article 2 - The parties desire to promote more efficient service for shippers and consignees, and to provide beneficial and fair cooperation in the northbound movement of cargoes between the ports or points of Brazil and the U.S. Gulf ports or points of the United States of America.

Article 4(a) - This Agreement covers the

> apportioning of freight revenue among the parties resulting from the freighting operations on all cargo that they carry as hereinafter described, transported by the parties northbound, on owned and/or operated vessels, from the ports of Brazil, within the Rio Grande-Victoria range, both inclusive, to any Gulf port of the United States of America, from Brownsville, Texas to Key West, Florida, both inclusive via direct or alternate coast port service . . . .
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> Article 11(a) - It is agreed that all cargo, shipped from ports of the Coast of Brazil and destined to ports of the Gulf of Mexico Coast of the United States of America, as established in Article 4, shall be subject to this pool, including transshipment cargo from Atlantic or at Gulf ports of the U.S.A. and other than U.S.A. destinations, such cargo hereinafter being referred to as pooled cargo . . . .

Similar changes were also made in the other six pooling agreements in the trades involving the United States and Argentina or Brazil which also became effective April 17, 1986.

The Inter-American Freight Conference tariff was amended in November 1985 to include alternate coast service. All pool carriers, including Ivaran, are members of this Conference.

The parties to Agreement No. 212-010027, the Atlantic Agreement, during the period here under consideration were: Companhia De Navegacao Lloyd Brasileiro; Companhia De Navegacao Maritima Netumar S/A; United States Lines (S.A.) Inc.; A/S Ivarans Rederi; Empresa Lineas Maritimas

Argentinas S.A.; A. Bottacchi S.A. De Navegacion C.F.I.I.; Van Nievelt Goudrian and Co., B.V.

The parties to Agreement No. 212-010320, the Gulf Agreement, during the period here under consideration were: Companhia De Navegacao Lloyd Brasileiro; Companhia Maritima Nacional; United States Lines (S.A.) Inc.; Empresa Lineas Maritimas Argentinas S.A.; A. Bottacchi S.A. De Navegacion C.F.I.I.; Transportacion Maritima Mexicana S.A. Thus, while USL/SA, an United States-flag carrier, was a member of both the Atlantic and Gulf Agreements, Ivaran, a Norwegian-flag carrier, was at the relevant time and remains a member of only the Atlantic Agreement.[1]

Ivaran offers direct service from Brazil to both U.S. Atlantic ports and U.S. Gulf ports. During the 1985-1987 period, USL/SA called directly only at U.S. Atlantic Coast ports. It offered an "indirect service" to U.S. Gulf Coast ports, making vessel calls at U.S. Atlantic Coast ports and transporting cargo overland under a through bill of lading to U.S. Gulf port destinations.

Am Trans has replaced USL/SA as a United States-flag carrier in the Brazil/U.S. trades. Am Trans became a party to both northbound Brazil/U.S. pools effective August 27, 1987, and became an active carrier about October 1, 1987. Am Trans' "direct" and "indirect" services are similar to those formerly provided by USL/SA.

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[1] Ivaran had at one time also been a member of the Gulf Agreement.

Ivaran was an original party to the northbound Brazil/Atlantic Agreement in 1973 when the Commission first approved the pool. USL/SA joined the Agreements about a decade later, at first serving only the Atlantic Coast of the United States, then apparently serving both Gulf and Atlantic Coasts directly, and then serving the Atlantic Coast directly and the Gulf Coast only by intermodal movements.

POSITIONS OF THE PARTIES

A. USL/SA

USL/SA asserts that the case is an appropriate one for resolution by issuance of a declaratory order because the Commission is the best placed body to determine its own intent in originally approving and now allowing the pooling agreements to remain in effect. There are no other pending proceedings involving the issues here presented, and a reference to arbitration would, USL/SA contends, only act to waste time and money since the matter would probably ultimately return to the Commission for determination, either by complaint filed by the losing party or primary jurisdiction reference by a court following an enforcement action by the prevailing party. Moreover, USL/SA points out, the legality of the Agreements as interpreted by an arbitrator would be subject to review by the Commission. Lastly, USL/SA states that, the Commission has frequently noted the appropriateness of declaratory order proceedings for disputes with respect to the payment of money.

Turning to the merits of the controversy, USL/SA contends that the Atlantic Agreement on its face makes clear that cargoes destined for Gulf Coast ports which move via Atlantic Coast ports are not to be accounted for in the Atlantic Coast pool. This analysis is based on the contention that the language in Articles 2 and 4 of that Agreement describing its coverage relating to Atlantic Coast "ports" is conditioned by the words "hereinafter described" in Article 4, and that the scope of the pool is "hereinafter described" in Article 11 as cargo "destined to" Atlantic Coast ports, rather than cargo "discharged at" such ports.[2]

USL/SA takes the position that the parties' actions under the Atlantic pool must be considered in light of the language of, and Commission and carrier actions relating to, Agreement No. 10320 (the Gulf Agreement) which, it contends, make it clear that cargoes destined for Gulf Coast ports which move via Atlantic Coast ports are to be accounted for only in the Gulf pool. USL/SA contends that modifications made to the Gulf pool Agreement in 1986 to provide for accounting of "alternate coast port service" in the Gulf pool were specifically permitted by the Commission to take effect with such intent and that this is supported by several Federal Register notices.

Moreover, USL/SA argues, Ivaran has been aware, since 1985, that the parties interpreted the pool agreements to

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[2] The text of these Articles is quoted at page 4, supra.

provide that cargoes destined for Gulf Coast ports which moved via Atlantic Coast ports would be included in the Gulf Coast pool and that Ivaran knew that several filed modifications of the pool agreements and the amendment to the Conference tariff providing for alternate coast service were all intended to achieve this result. Yet Ivaran is said to have never objected to these modifications, either at pool meetings or before the Commission.

USL/SA asserts that Ivaran is not adversely affected by accounting for alternate coast service in the Gulf pool since Ivaran is not a member of that pool and could easily be placed on the same competitive basis as USL/SA (now Am Trans) by joining the pool. It contends that the lower pool payment resulting from the accounting of the alternate coast service in the Atlantic pool would result in a windfall to Ivaran.

Lastly, USL/SA contends that the parties clearly have the authority under the pool agreements to modify pool accounting periods. Such authority, it asserts, is merely interstitial and has frequently been asserted without specific agreement authorization. Moreover, USL/SA states that Article 26(b) of the Atlantic Agreement specifically

provides the authority to modify pool accounting periods.[3] Moreover, the departure of USL/SA from the pool and its replacement by Am Trans allegedly provides a practical operational reason for the action which all the parties to the Atlantic Agreement, except Ivaran, desire.

B. Ivaran

Ivaran asserts that the problems presented by USL/SA are not appropriate for resolution by declaratory order. First, Ivaran contends that the Petition should be denied because USL/SA admitted to the Brazilian carriers that Ivaran's interpretation of the Brazil Northbound Atlantic Agreement is correct, Ivaran paid money in reliance on the admission, and USL/SA is proceeding in bad faith in attempting to subject Ivaran to additional payments. To the extent that USL/SA is seeking a determination that will require consideration of factual issues and a payment of money if USL/SA prevails, Ivaran submits that USL/SA should file its claim in arbitration pursuant to the Atlantic Agreement, and that the questions USL/SA presents are not

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[3] Article 26(b) provides:

> [A]ny changes specified in Article . . . 17(a) [which deals with pool accounting periods] . . . shall, if the parties so agree, become effective immediately, and the parties shall give notice of such changes to the appropriate governmental authorities.

ripe for a declaratory order.[4]

Insofar as the merits of the controversy are concerned, Ivaran asserts that the relevant terms of the Brazil Northbound Atlantic Agreement are clear and unambiguous, and require the inclusion of all cargoes unloaded at Atlantic Coast ports in the accounting for the Brazil Northbound Atlantic Agreement. Ivaran maintains that Article 4(a) explicitly covers "all cargo" to "any port on the Atlantic Coast of the United States," and that Article 11 equally clearly covers "all cargo," with any exceptions being specifically stated. There is no specific exception for "alternate coast cargo," and the Atlantic Agreement is said to have been consistently interpreted since its inception in 1973 to cover all cargo not specifically excepted regardless of ultimate destination. Ivaran contends that if USL/SA's position prevails, the result will be a violation of sections 10(a)(2) and (3) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1709(a)(2) and (3), which prohibit operation under agreements not filed with the Commission or operation under agreements required to be filed except in accordance with the filed terms.

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[4] Article 21(a) of the Atlantic Agreement provides:

> Any and all differences and disputes of whatsoever nature as arising out of the Pooling Agreement which cannot be resolved by signators of this Agreement . . . shall be placed in arbitration in accordance with the rules and regulations of the Inter-American Commercial Arbitration Commission . . . .

Ivaran argues that it cannot be bound by changes not approved by all members of the Atlantic Agreement, statements made by USL/SA, or language in Commission notices relating to modifications of the Gulf pool, to which Ivaran does not belong. Moreover, Ivaran asserts, the Conference tariff filed with respect to "alternate coast cargo" merely permitted USL/SA lawfully to transport such cargo and had no effect upon the accounting provisions of the Atlantic pool Agreement.

Ivaran submits that any "double accounting" problem, i.e., accounting for cargo moving under through bill of lading to Gulf Coast ports in both Atlantic and Gulf pools, may be cured by amending the Gulf Agreement to eliminate the alternate coast cargo, and that the requested interpretation of the Atlantic Agreement could cause reduction of direct service to Gulf ports. It also contends that the construction which USL/SA seeks "bleeds off" revenue from the northbound Atlantic pool which results in increasing Ivaran's pool payment, and that the effect of excluding alternate coast cargo from the northbound Atlantic pool is to foster a less efficient service, i.e., combination rail-water as opposed to Ivaran's all-water service.

Ivaran also argues that USL/SA's request to modify the pool, so as to settle the 1987 pool after the first quarter, has not been agreed to unanimously by the parties, and thus

is contrary to the Atlantic Agreement[5] and the 1984 Act. Ivaran advises that at a meeting held in November, 1987, the parties to the Brazil Northbound Atlantic Agreement, which did not then include USL/SA, decided unanimously to defer the entire 1987 pool year settlement until the end of 1988, and that this agreed change in the pool period will clarify the status of the first quarter of 1987 by including it in the settlement at the end of 1988.

In conclusion, Ivaran asserts that USL/SA's Petition is incorrect as to the law and the facts and should be summarily denied. If the Commission believes that further facts are necessary for resolution of the matter, Ivaran contends that the parties should be referred to arbitration.

C. Am Trans

Am Trans, USL/SA's successor in the pools, supports the Petition. In addition to adopting USL/SA's arguments, it contends that the Commission should not accept Ivaran's position because to do so would create an agreement interpretation which would cause a violation of section 10(c)(2) of the 1984 Act, which prohibits a conference or two or more common carriers from "engag[ing] in conduct that unreasonably restricts the use of intermodal services or technological innovations." Ivaran's interpretation would, Am Trans asserts, restrict the alternate coast service

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[5] Section 17(a) provides:

> "From time to time the parties may, by mutual agreement, agree to change the pool period."

because including alternate coast carrier revenues in the Atlantic pool could result in overcarriage payments.

On the accounting issue, Am Trans states that the Atlantic Agreement was modified with Ivaran's consent after USL/SA's withdrawal to provide new, increased pool shares for the remaining lines between April 1, 1987 and September 30, 1987, when no U.S.-flag carrier participated, and to provide for the rendering of separate accounts for three periods in 1987, the period USL/SA participated, the period no U.S.-flag carrier participated, and the period Am Trans participated. These amendments, Am Trans submits, are inconsistent with an argument that there should be no separate accounting to give effect to USL/SA's withdrawal.[6]

DISCUSSION

The issues which must be addressed in this proceeding are: (1) whether the issuance of a declaratory order is the

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[6] Ivaran takes the position that Am Trans' request for intervention should be denied on the grounds that Am Trans' position is duplicative of that of USL/SA and confusing and inaccurate. We do not agree. Although Am Trans does restate some of USL/SA's arguments and may state some disputed facts, it also makes legal arguments not made by USL/SA. More importantly, however, although Am Trans will not be affected by the apportionment of revenues between USL/SA and the pool members for the time before it joined the Agreement, Am Trans is now a party to the Atlantic Agreement and will be materially affected by any interpretation rendered by the Commission, particularly since it operates in substantially the same manner as USL/SA did when it was a pool member. Under these facts intervention is appropriate, either as of right or as a matter of Commission discretion. See Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72.

appropriate means of resolving the problem presented by the Petition; and (2) if so, whether the interpretations sought by the Petition should be "declared" by the Commission as the proper ones. Each of these issues is addressed in turn below.

A. Appropriateness of Declaratory Relief

The power of agencies to issue declaratory orders has long been established. It is specifically recognized in the Administrative Procedure Act. 5 U.S.C. § 554(e)(b) (1982). Such orders are, moreover, particularly appropriate to interpret the meaning of "words of art" contained in filings within the regulatory responsibility of an agency. See e.g., Illinois Terminal R. Co. v. ICC, 671 F.2d 1214, 1216 (8th Cir. 1982).

The pooling agreements filed with the Commission cannot be considered private contracts. The terms in them are subject to Commission interpretation. In fact, it has been held that broad deference is due Commission interpretation of "contracts" it regulates, and that such interpretation is to be upheld if it is a "reasonable" one. See e.g., FMC v. Australia/U.S. Atlantic & Gulf Conf., 337 F.Supp. 1032, 1037 (S.D.N.Y. 1972); Swift & Co. v. FMC, 306 F.2d 277, 281 (D.C. Cir. 1962) ("Swift"); Trans-Pacific Frgt. Conf. of Japan v. FMC, 314 F.2d 928, 935 (9th Cir. 1963). As the court said in Swift, an agreement subject to the Commission's jurisdiction

> is not simply a private contract between private parties, the intent of the parties is only one

> relevant factor, and the Board not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. Moreover, the agreement exist[s] legally only because approved by the Board. The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval.

306 F.2d at 281.[7]

Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, authorizes issuance, in the Commission's discretion, of declaratory orders "to terminate a controversy or to remove uncertainty" on "matters involving conduct or activity regulated by the Commission under statutes administered by the Commission . . . [to] allow persons to act without peril upon their own view." Thus, the general subject matter of the Petition appears an appropriate one for the issuance of a declaratory order.

This is not to say, however, that we are required to entertain the Petition. USL/SA urges that the Commission issue the declaratory order on the basis that such action will expedite the resolution of an issue which will require

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[7] Although the Commission no longer actively "approves" agreements under the 1984 Act as it did under the Shipping Act, 1916 (see 46 U.S.C. § 814 (1982)), the pooling agreements filed with it remain "public contracts." Parties must file the agreements with the Commission (section 5(a), 46 U.S.C. app. § 1704(a)), and can act only in accordance with the terms of their filed agreements (sections 10(a)(2) and (3), 46 U.S.C. app. § 1709(a)(2) and (3)). Moreover, agreement parties are specifically prohibited from engaging in certain activities (section 10(c), 46 U.S.C. app. § 1709(c)), and the Commission is authorized to "disapprove, cancel or modify any agreement . . . that operates in violation of this [1984] Act." (section 11(c), 46 U.S.C. app. § 1710(c)).

ultimate resolution by the Commission, i.e., the validity of its interpretation of various pooling agreements. Ivaran contends that if the Commission rejects its argument that the plain language of the Northbound Atlantic pool is contrary to USL/SA's interpretations, unresolved factual questions will arise which cannot be properly resolved on the present record, and that the case should then be referred to arbitration as required by the Atlantic Agreement. Ivaran also argues that USL/SA's Petition is in essence a claim for money and is therefore an inappropriate subject for declaratory relief.

In determining whether to entertain the Petition before us here, we have reviewed relevant precedent with respect to the issuance of declaratory orders. Instances in which the Commission granted declaratory orders or denied them on their merits include: Virginia Port Authority (Petition For Declaratory Order), 21 S.R.R. 199 (1981), aff'd. without opinion sub nom. Portsmouth Terminals, Inc. v. FMC, 694 F.2d 281 (D.C. Cir. 1982) (table); Ocean Shipments Via American President Lines, 21 S.R.R. 1168 (1982); Maximum Potential Liability in Independent Ocean Freight Forwarder Bonds, 24 S.R.R. 587 (1987); Application of Tariff Filing Requirements to the Carriage of Forest Products Under the Shipping Act of 1984, 24 S.R.R. 539 (1987). On the other hand, Lease Agreement No. T-3753 Between Maryland Port Administration and Atlantic & Gulf Stevedores, Inc., 21 S.R.R. 306 (1981); In the Matter of Board of Commissioners of the Port of New

Orleans, Dock Department Tariff FMC T-No. 1, Item 145-0, 21 S.R.R. 1603 (1983); Compensation of Freight Forwarders, 19 S.R.R. 1741 (1980); Seatrain International, S.A., 18 S.R.R. 805 (1978); Docket No. 87-18, Matson Navigation Company, Inc., Order Denying Without Prejudice Petition for Declaratory Order, served June 7, 1988, present instances in which the Commission declined to issue declaratory orders.

Analysis of the above-cited cases reveals that the following factors weigh heavily in favor of issuance of such orders (and their absence against it): (1) presentation of clear-cut legal issues and non-disputed facts; (2) ability of the Commission to resolve all issues in a proceeding so as to terminate the controversy; (3) presence of issues of fact or law which require the Commission's expert knowledge or judgment; (4) non-pendency of other proceedings or absence of need to resort to other tribunals to resolve matters in dispute; (5) claim which is purely declaratory in nature as opposed to an action for reparation for violation of statutes or regulations. Application of these criteria to this proceeding, on balance, indicates the appropriateness of issuance of a declaratory order here.

The legal issues presented are clear-cut, and while some of the factual ones are in dispute, this fact alone will not prevent issuance of a declaratory order which would otherwise be appropriate. The Commission may in some cases resolve disputed facts itself, and the Commission's declaratory order rule contemplates that evidentiary

hearings may sometimes be necessary for resolution of petitions for declaratory orders (see Rules of Practice and Procedure, Rule 68(c), (d), (e)). The Commission has, in fact, referred petitions for declaratory orders to administrative law judges for hearings and initial decisions. See Ocean Shipments Via American President Lines, 21 S.R.R. at 1169.

The Commission alone of all bodies of review has the ability in the first instance to resolve all the issues in this proceeding so as to terminate the controversy. As noted in Swift, the legal existence of the agreement stems from the Commission's assertion of authority over it and therefore, subject to court review, only the Commission can determine the scope of the agreement and the extent of its prior approval. See 306 F.2d at 281-82.[8]

There are at present no proceedings pending before any other tribunals, nor does it appear necessary to resort to them to resolve the matters here in dispute. While there exists a strong policy of referring disputes under Commission-approved agreements or agreements on file with the Commission and in effect which contain provisions for arbitration to such arbitration for determination in the

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[8] In addition, the specific problem of the lawfulness under the 1984 Act of "the double accounting" which would arise if the interpretation for which USL/SA contends is found to be incorrect, and which we raise for preliminary examination herein, is beyond the competence of an arbitration panel.

first instance,[9] this policy is not controlling where, as here, the primary issue to be decided is a legal interpretation of a contractual provision, as opposed to a question of the provision's application under a disputed factual situation. Moreover, as USL/SA correctly contends, reference to arbitration would probably only act to delay ultimate resolution of the controversy since the losing party could be expected to bring the matter back before us.

Finally, arbitration could only resolve factual questions such as the intent of the parties, but the legality of the Agreements must be determined by the Commission. See Swift, 306 F.2d at 282. Indeed, Ivaran has itself recognized, in a related proceeding, that, "[i]t is for the Commission, and the Commission alone, to determine whether parties have exceeded the authority in an

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[9] See e.g., Firestone International Co. v. Far East Conference, 9 F.M.C. 119, 128 (1965); The Dual Rate Cases, 8 F.M.C. 16, 44 (1964), reversed on other grounds sub nom. Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 958 (1965); Possible Breach of Pacific Coast European Conference Rate Agreement, 17 F.M.C. 205 (1973), aff'd. sub nom. Pacific Coast European Conference v. FMC, 537 F.2d 333 (9th Cir. 1976); Persian Gulf Outward Freight Conference - Dual Rate Contract, 8 F.M.C. 293 (1964); Modification of Agreements No. 150 and 3103, 11 F.M.C. 434 (1968); cf. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

agreement."[10] The fact that in that proceeding recourse was first had to an arbitration panel shows neither the error of such approach nor its necessity. The matter here to be determined is not one involving solely a "difference or dispute arising out of a pooling agreement," required to be submitted to arbitration under Article 21(a) of the Atlantic Agreement. That would be the case if the matter in issue was whether or not certain conduct fell within an agreement. As the Commission explained in Possible Breach of Pacific Coast European Conference Rate Agreement, "[W]ere we dealing here with a dispute requiring a legal interpretation of one of the contractual provisions of the Conference contract . . . ," rather than a factual dispute as to whether certain shipments fell within language of the contract, the Commission "might well be inclined to agree" that the Commission, rather than arbitrators, should decide the matter. 17 F.M.C. at 211. Thus, a dispute involving contract interpretation (such as the dispute in the present case) is not suitable for arbitration if it involves a

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[10] See Ivaran's Motion for Summary Judgment, 51, in Docket No. 86-9, A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasileiro, et al. That proceeding involves interpretation of another clause of the Atlantic Agreement. That clause has been the subject of an arbitration decision and an initial decision of a Commission administrative law judge, and is now pending before the Commission on exceptions to the initial decision and a motion to stay pending review by the Supreme Court of Brazil of a lower Brazilian court decision voiding the arbitration decision. We deny today by separate order in Docket No. 86-9 the motion to stay pending review of the Brazilian court order relating to the arbitration proceedings.

determination of the scope of the parties' authority under an approved agreement.

We do not find the Supreme Court decisions in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) ("Scherk") and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) ("Mitsubishi"), cited by Ivaran in support of the alleged need to refer disputed matters here to arbitration, to be controlling here. Scherk, as the Court explained, involved a federal law, the Securities Act of 1934, which did not contain specific private remedies and did not prohibit a private agreement to waive rights to sue in court. 417 U.S. at 513-14. As explained in Swift, such private agreement could not lawfully exist here, and section 11 of the 1984 Act, 46 U.S.C. app. § 1710, contains specific and expanded private rights of action. Mitsubishi, which permitted enforcement of an arbitration clause to require referral of an antitrust claim to arbitration in the first instance, stressed that such referral could not defeat the right of claimants to a decision under United States law on their antitrust claims. The Court in fact relied upon representations of counsel that the arbitrators would apply United States antitrust law.

The situation is different here. Arbitrators construing another provision in the Atlantic Agreement have already applied Brazilian, rather than United States law,

and did not consider Shipping Act issues at all.[11] Moreover, unlike Mitsubishi, this case involves an international contract of a type which has continuously been held to be impressed with a public interest, which enjoys antitrust immunity, and which an agency had been required to approve, in other words, a contract with consequence extending beyond the private interests of the signatory parties. As we and the court in Swift have indicated, activities under such a contract must be carried out in accordance with the dictates of the shipping statutes and the Commission's intentions, matters upon which arbitrators are not legally competent to pass.

The Petition's request is purely declaratory in nature and not an action for reparations for violation of a statute or regulations. No action for reparations can exist until a violation of the statute has occurred and unlawful payment of charges has been made. See e.g., Ace Machinery Co. v. Hapag-Lloyd, 16 S.R.R. 1258, 1262, recon. denied, 16 S.R.R. 1531, 1533 (1976); Aleutian Homes, Inc. v. Coastwise Line, 5 F.M.B. 602, 611 (1959); USA v. Hellenic Lines Limited, 14 F.M.C. 255, 260 (1971); Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 U.S.S.B.B. 308, 310-11 (1934); see also Louisville Cement Co. v. ICC, 246 U.S. 638, 644 (1918); Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534 (1918). In fact, the Commission has held that a

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[11] See Order Denying Stay issued today in Docket No. 86-9.

dispute as to apportionment of as yet unpaid monies under an agreement is the kind of dispute which a declaratory order is designed to resolve. See Virginia Port Authority, 21 S.R.R. at 201-02.[12]

B. The Merits of the Petition

1. Pool Period

The issue of the appropriate pool period has to some extent been overtaken by events subsequent to USL/SA's departure from the Atlantic Agreement. A modification of the Atlantic Agreement agreed to by all parties now on file with the Commission and in effect as of January 31, 1988 (Agreement No. 212-010027-019) provides for three separate stages in the pool period terminating on December 31, 1987:

> January 1st/March 31st 1987 (with the presence of the U.S.-Flag) (USL/SA)

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[12] Ivaran's contention that USL/SA should be barred on equitable grounds from maintaining this action because it misled Ivaran to Ivaran's detriment involves factual allegations which the present record is inadequate to resolve, even were the Commission to rely upon the March submissions of USL/SA and Ivaran. Although actions of parties to an agreement may act to bar them from claiming thereunder under doctrines of estoppel or waiver, evidence of such actions must be strong and unequivocal. See e.g., Agreement No. T-2336, 18 S.R.R. 275, 279, affirmed in part and reversed in part sub nom., New York Shipping Association v. FMC, 628 F.2d 253, 259-60 (D.C. Cir. 1980). Moreover, to the extent Ivaran's argument would prevent the rendering of a proper interpretation of an agreement it cannot be entertained, particularly where, as here, the rights of other parties, like USL/SA's successor, Am Trans, are involved. The Commission's obligation to carry out its statutory duty with respect to agreements it regulates should not be thwarted by inconsistent actions of parties under the agreements. See e.g., New York Shipping Association v. FMC, 571 F.2d 1231, 1239 (D.C. Cir. 1978).

April 1st/Sept. 30th 1987 (without the presence of the U.S.-Flag)

Oct. 1st/Dec. 31st 1987 (with the presence of the U.S.-Flag) (Am Trans).

Settlement is to be made together with the final settlement of the pool period terminating on December 31, 1988.

The Atlantic Agreement now permits a reconciliation and payment on less than a full calendar year basis when a national-flag carrier terminated its services in the trade as a result of bankruptcy, and has been replaced by a new national-flag carrier in the trade and the Agreement.[13] Thus, the January 31 modification appears to have answered in the affirmative and mooted the second question raised in the Petition.

2. Alternate Coast Port Service

The merits of the alternate coast port service question are far from easy to resolve. On the one hand, the literal language of the Atlantic Agreement would seem to support Ivaran's interpretation, since the use of the word "port" does not appear, from the face of the Atlantic Agreement, to depend upon transportation arrangements through the port. Similarly, the language of the Atlantic Agreement is broad in scope and specific exclusions were made for certain

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[13] As USL/SA observes in its letter of March 10, 1988,

> While Ivaran correctly notes the parties agreed to delay payments until after the close of the 1988 pool year, this is not inconsistent with USL/SA's position that the period (or stage) of the pool January 1-March 31, 1987 should be taken into account separately.

categories of cargo, which do not specifically include intermodal shipments. However, USL/SA's interpretation is also not without basis in the literal language of the Atlantic Agreement (see page 8, supra).

More importantly, while activities cannot be found lawful which are not authorized by language in an agreement, it does not necessarily follow that mere examination of an agreement is enough to determine if certain conduct is authorized. For example, it may not be sufficient to rely merely on the words of one or more of the pool agreements without examining the background against which the agreements and amendments were approved. Thus, for example, in Port of New York Authority v. FMC, 429 F.2d 663, 667-68 (5th Cir. 1970), cert. denied, 401 U.S. 909 (1971), the court upheld a Commission finding that general ratemaking authority encompassed the authority to fix overland/OCP rates because such rates were commonly in use for many years at the time of approval and known to be so by the Commission and thus were routine matters authorized by such ratemaking authority. Similarly, in Interpool Ltd. v. FMC, 663 F.2d 142, 149-51 (D.C. Cir. 1980), the court explained that whether certain tariff amendments affecting the leasing of neutral containers required specific agreement authorization could not be determined solely by reference to the language of the approved agreement but required an examination of the impact of the practice on competition to decide if the practice acted in a manner which could reasonably be

inferred from the language of the agreement. See also Cancellation of Consolidation Allowance Rule, 20 F.M.C. 858, 866 (1978). Thus, the fact that cargo may in the past have been treated as falling within the Atlantic pool regardless of destination may not be instructive of the treatment to be given intermodal cargo if, as USL/SA contends, cargo in the past did not move from Atlantic to Gulf ports under through bills of lading.

Another factor which must be considered in addressing the Petition is that of the filing and effectiveness of the modifications of the related pools, particularly the northbound Gulf pool. On the one hand, one might contend that Ivaran should not be bound by any of the modifications to the related pools since it is a member only of the Atlantic pool, which has not been modified. On the other hand, we must consider the significance of the notice provided by the Federal Register publication of the related agreements, as well as the fact that the effectiveness of these agreements has resulted in the accounting of intermodal cargo in the Gulf pool, and the issues which may therefore have arisen because of multiple pool accountings. Thus, the effect of Ivaran's failure to challenge the Gulf Agreement modifications is an important issue here.

Review of the submissions presented here reveals nothing definitive in resolving the matter in controversy. Pool meeting minutes reflect that all members of the Atlantic pool except Ivaran agreed with USL/SA's

interpretation of the scope of the Atlantic Agreement, although there is disagreement as to the clarity of the language and need for modification. The transmittal letter from filing counsel with respect to the modifications in the Gulf pool indicates, however, that "all the parties may not share" the view that the unmodified language of the Gulf Agreement authorized counting "alternate coast" cargo in the Gulf pool.

Insofar as case law is concerned, it, in general, tends to favor a restrictive interpretation of the scope of agreements largely on the bases that they are to be construed against their draftsmen and that the parties' intent does not control as to their interpretation. See e.g., FMC v. Australia/U.S. Atlantic & Gulf Conf., 337 F.2d at 1037; Swift, 306 F.2d at 281; Disposition of Container Marine Lines, 11 F.M.C. 476, 485-88 (1968) (CML). Agreement interpretations, however, should not be such as to threaten the development of new services, particularly intermodal services. See CML, 11 F.M.C. at 488-89; Swift Co. v. Gulf and South Atlantic Havana Conference, 6 F.M.B. 215, 226 (1961), aff'd in relevant part in Swift, 306 F.2d at 281.

We therefore conclude that the best approach here is to find the Petition appropriate for declaratory relief and refer the matter to an administrative law judge for determination of critical facts and issuance of an initial decision. Such approach will enable the Commission to issue a decision which will fully resolve the questions raised in

the Petition. Moreover, resolution in this Order of some of the issues raised in the Petition will allow us to so structure the referral so as to expedite the proceeding to the greatest extent possible.

To facilitate the hearing process we will, in addition, direct that all filings made to date with respect to the Petition be incorporated into the record herein for whatever purpose and with whatever weight may be appropriate. Lastly, to more clearly focus the issues of fact and law yet to be resolved, we will identify in our referral specific questions to be answered in addition to the broad question of the legal validity of the proposed conflicting interpretations of the Agreements. One of these questions is intended to address the issue of a "double accounting," which would occur if the interpretation for which USL/SA contends is found to be incorrect. In that case, the question will arise of the lawfulness of such double accounting under the 1984 Act and the need for the institution of further proceedings directed toward the possible disapproval, cancellation or modification of one or the other of the Agreements to remove the "double accounting."

THEREFORE, IT IS ORDERED, That that portion of the Petition of USL/SA which seeks a declaratory order with respect to the question of whether the Agreements permit a reconciliation and payment on less than a full calendar year basis when a national-flag carrier terminated its services

in the trade as a result of bankruptcy, and has been or will be replaced by a new national-flag carrier in the trades and Agreements is dismissed as moot; and

IT IS FURTHER ORDERED, That that portion of the Petition of USL/SA which seeks a declaratory order with respect to the question of whether cargo moving by water from Brazil, discharged from the vessel at an Atlantic Coast port and then transported by overland transportation to a Gulf port, moving under a bill of lading showing a Gulf port as the destination port, should be accounted for in only the Gulf Pool is referred to the Chief Administrative Law Judge for assignment and issuance of an initial decision; and

IT IS FURTHER ORDERED, That the Administrative Law Judge to whom this proceeding is assigned shall exercise his discretion to insure that the remaining issues are resolved in the most expeditious means consistent with due process and a sufficient record upon which to render a decision; and

IT IS FURTHER ORDERED, That in reaching the ultimate issue in this proceeding, specific attention shall be devoted to and findings made with respect to the following:

1. The manner in which cargo was transported prior to and at the time of approval of the Agreements and at the time of approval or effectiveness of any relevant amendments, i.e., the use of alternate coast port service or similar service at critical times for approval or effectiveness purposes;

2. Any contemporaneous expressions of intention by the parties with respect to the intended effect of the Agreements or relevant amendments on their scope with respect to type of movements covered;

3. The effect of the modifications of the Gulf Agreement in 1986 to provide for accounting of "alternate coast port service" in the Gulf pool upon the scope or interpretation of the Atlantic Agreement;

4. Should the interpretation for which USL/SA contends be found to be incorrect, the need or desirability of the institution of further proceedings directed toward the disapproval, cancellation or modification of the Atlantic or Gulf Agreements; and

IT IS FURTHER ORDERED, That pursuant to the terms of Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, the initial decision of the Administrative Law Judge shall be issued by June 22, 1989 and the final decision of the Commission shall be issued by October 23, 1989;

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register, and a copy be served on parties of record;

IT IS FURTHER ORDERED, That American Transport Lines, Inc. is granted intervention in this proceeding;

IT IS FURTHER ORDERED, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72

of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72;

IT IS FURTHER ORDERED, That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on parties of record; and

FINALLY, IT IS ORDERED, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.118, and shall be served on parties of record.

By the Commission.*

Joseph C. Polking
Secretary

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* Chairman Elaine L. Chao did not participate.